UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

| In the Matter of: | |
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| DERYLE BOURGEOIS,<br><br>Respondent. | HUDALJ 90-1407-DB |

Kenneth Joel Haber, Esquire
For the Respondent

Marylea Byrd, Esquire
For the Department

Before: Thomas C. Heinz
Administrative Law Judge

## INITIAL DETERMINATION

### Statement of the Case

This proceeding arose as a result of a proposal by the Department of Housing and Urban Development ("the Department" or "HUD") dated October 10, 1989 to debar Deryle Bourgeois ("Respondent Bourgeois") and his named affiliate, Southern Title Company ("Respondent Southern") from participating in covered transactions as either participants or principals at HUD and throughout the Executive Branch of the Federal Government and from participating in procurement contracts at HUD for a period of three years pursuant to 24 C.F.R. sec. 24.100 *et seq.*

The Department's proposal is based upon Respondent Bourgeois' felony conviction under 18 U.S.C. sec. 1001 in the United States District Court for the Eastern District of Louisiana. Respondents requested a hearing on the proposed debarment by letter dated November 9, 1989. Because the proposed action is based upon a conviction, the hearing in this case is limited under 24 C.F.R. sec. 24.313(b)(2)(ii) to the

submission of documentary evidence and written briefs, as more particularly discussed below.

## Findings of Fact

1. Respondent Bourgeois is a real estate investor. Respondent Southern is a Louisiana corporation engaged in handling real estate closing transactions. Respondent Bourgeois is a shareholder in Respondent Southern and has acted as a closing officer in real estate closing transactions handled by Respondent Southern. (Respondents' November 9, 1989 Brief)

2. On June 28, 1989, the United States District Court for the Eastern District of Louisiana issued a finding and judgment based on a plea of guilty[1] that Respondent Bourgeois did "WILFULLY AND KNOWINGLY FALSIFY MATERIAL FACT TO OBTAIN LOAN THROUGH U.S. DEPARTMENT NAMELY H.U.D." Respondent Bourgeois was sentenced to three years in jail (of which two and a half years were suspended and six months served in a halfway house), and to supervised probation for five years. He was also ordered to pay $200,000 as restitution to HUD, plus a special assessment of $50.00.(Exhibit B, Government's Brief in Support of Debarment)

3. Thereafter, as noted above, by letter dated October 10, 1989, the Department notified Respondent Bourgeois that based upon his conviction in U.S. District Court, he and his named affiliate were the subjects of a proposed three-year debarment, and that pending final determination of the matter, he and that affiliate, Respondent Southern, were suspended from participating in covered transactions.

## Discussion

The Department asserts and Respondent Bourgeois does not deny that by virtue of his ownership and operation of Respondent Southern he has participated as a "principal" in "covered transactions" within the meaning of and subject to HUD regulations. (24 C.F.R. sec. 24.100 *et seq.*) Likewise, the Department asserts and

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[1]Respondent pled guilty to Count I of an indictment which reads: "On or about April 11, 1985, in the Eastern District of Louisiana, DERYLE BOURGEOIS, in a matter within the jurisdiction of a department of the United States, that is, HUD, for the purpose of obtaining a loan for G & N Enterprises with Cameron Brown Mortgage Company, did willfully and knowingly falsify, conceal and cover up by trick, scheme and devise [sic] a material fact, namely, in that DERYLE BOURGEOIS temporarily deposited $155,000 of his own funds in G & N Enterprises' bank account in order to make it appear that G & N Enterprises could make three months worth of mortgage payments for Elm Park Subdivision.

In violation of Title 18, United States Code, Section 1001." (Exhibit A, Government's Brief in Support of Debarment)

Respondent Bourgeois does not deny that a principal may be debarred from further participation in covered transactions based on conviction of or civil judgment for

> [c]ommission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice...

24 C.F.R. sec. 24.305(a)(3). Finally, Respondent Bourgeois does not quarrel with the Department's argument that the evidence shows Respondent Bourgeois was convicted of making a false statement and that debarment must be established by a preponderance of the evidence, a standard deemed satisfied by evidence of a conviction. (24 C.F.R. sec. 24.313(b)(3)) Nevertheless, Respondent Bourgeois argues that neither he nor Respondent Southern should be suspended or debarred, and that he has a right to an oral hearing to present mitigating evidence. Neither of these arguments has merit.

Section 24.313(b)(2)(ii) of the regulations clearly shows that Respondent Bourgeois does not have a right to an oral hearing in this case:

> Where the action is based solely upon an indictment or conviction, civil judgement, or upon suspension or debarment by another Federal agency, the hearing shall be limited to the opportunity to submit documentary evidence and written briefs for consideration by a hearing officer;

24 C.F.R. sec. 24.313(b)(2)(ii). Respondent Bourgeois argues that he has a right to the oral hearing provided in 24 C.F.R. 24. 313(b)(2) because the Department's case against him is not based "solely" upon his conviction. In support of his argument he cites this language from the Department's brief: "The cause for Respondent's debarment is his conviction, *and the actions related to it.*" (Emphasis supplied.) Despite the presence of this arguably ambiguous language in the Department's brief, a thorough search of the record reveals no evidence that the Department is in fact relying on anything other than the conviction and the facts upon which that conviction rests. In other words, since this action is based solely on a conviction, Respondent Bourgeois has no right to an oral hearing according to the regulations.

Respondent also argues that he has a right to an oral hearing because there are material facts in dispute:

> [W]hile it is not contested that Respondent Bourgeois has been convicted of an offense, he has the burden of proving mitigating circumstances [24 CFR 24.313(b)(4)] and various material facts are apparently contested by the government: (1) his present responsibility (or lack thereof); (2) whether his

> role in the fraudulent scheme was without premeditation wherein he was innocently swept up by the actions of others without any participation in developing the scheme himself; (3) whether he fully cooperated with the authorities in an effort which protected the government's programs and, thereby, established his integrity, honesty and responsibility; (4) whether he would report future schemes against the government which he became aware of and not knowingly participate in them; and (5) whether Respondent Deryle Bourgeois is basically an honest man.

(Respondents' Reply Brief, page 5.) Regarding the first alleged material "fact" in dispute, the question of "present responsibility" is an issue of law, not fact. Insofar as the remaining four formulations indeed represent "material facts" as opposed to argument, contrary to Respondent Bourgeois' contention, the record does not show the Department disputes them. Accordingly, even if we assume for purposes of argument that Respondent Bourgeois is correct in his contention that a respondent has a right to an oral hearing when there are material mitigating facts in dispute, since there are no material mitigating facts in dispute in this case, Respondents do not have a right to an oral hearing.

Respondent Bourgeois next argues that the legislative history of the regulations governing this proceeding as well as fundamental due process both require that he be afforded an oral hearing. This argument is likewise unavailing. The section of the legislative history cited by Respondent, namely Vol. 53, No. 102, Fed. Reg. page 18168 (May 26, 1988), shows Respondents have no such right:

> The procedural section of the proposed common rule was drafted to conform to the procedures for debarment under FAR. *Those regulations have withstood Constitutional challenge. Where material facts are not in dispute, due process does not require a full fact-finding hearing, including confrontation of witnesses. The final rule like the proposed rule, neither requires agencies to nor precludes them from providing hearings to receive and consider mitigating evidence and other information that may influence the agency's decision.* (Emphasis supplied)

The regulations do not provide for an oral hearing where a respondent has been convicted of one of several listed offenses, and there is no indication in the case law that these regulations violate Constitutional due process requirements. The 1964 case cited by Respondent Bourgeois in support of his argument, *Gonzalez* v. *Freeman*, 334, F. 2d 570, (D.C. Cir. 1964), does not stand for the proposition that every respondent in every debarment case is entitled to an oral hearing. Rather, the rule of *Gonzalez* is that the Government cannot debar someone from conducting business with the Government

without having followed procedural regulations promulgated pursuant to the Administrative Procedure Act. This rule has been satisfied by the Department in the instant case. In short, Respondents have no right to an oral hearing. This case must be decided on the written record.

The purpose of debarment is to protect the public interest by precluding people who are not "responsible" from conducting business with the Federal Government. *See,* 24 C.F.R. sec. 24.115(a). *See also, Stanko Packing Co. v. Bergland,* 489 F. Supp. 947, 949 (D.D.C. 1980); *Roemer v. Hoffman,* 419 F. Supp. 130, 131 (D.D.C. 1976). In government contract law, "responsibility" is a term of art which encompasses integrity,

honesty, and business performance ability. Determining "responsibility" requires an assessment of the present risk that the Government will be injured in the future by doing business with a respondent. That assessment may be based upon past acts. *See, Schlesinger v. Gates,* 249 F.2d 111 (D.C. Cir. 1957); *Roemer, supra.* Respondent Bourgeois' felony conviction of willfully and knowingly making a false statement in order to obtain a HUD-insured loan clearly demonstrates a lack of integrity and honesty which puts the Government at risk if it conducts business with him.[2] Accordingly, there is cause for debarment.

Respondent Bourgeois argues that despite his conviction he should not be debarred because: 1. He did not act with intent to defraud HUD; 2. This is his first illegal act in 15 years in the real estate business; and, 3. Debarring him will effectively deprive him of the livelihood necessary to pay the $200,000 restitution ordered by the U.S. District Court. None of these arguments has any merit. Debarment by HUD is not predicated on finding a specific intent to harm HUD; hence this argument falls far from the mark. Similarly, whether or not this is the first time Respondent Bourgeois has run afoul of the law, the fact remains that the risk of loss for the Government is greater if it does business with Respondent Bourgeois than if it conducts business with someone who has not been convicted of a crime involving dishonesty and a lack of integrity.

As for the argument that debarment would jeopardize restitution to HUD for some of the loss caused by Respondent Bourgeois, even assuming that argument could be credited in the proper case, this is not the case to do so. According to Respondent Bourgeois' Reply Brief, he is a "real estate investor." The indictment states that he "temporarily deposited $155,000 of his own funds in G & N Enterprises' [sic] bank account in order to make it appear that G & N Enterprises could make three months

[2]The Department argues in its Brief: "While honesty, integrity and responsibility are expected of all those who participate in HUD programs, such expectations are especially important in individuals who instruct others on participating in HUD program requirements and other real estate transactions." There is no evidence that Respondent Bourgeois has been a teacher. Counsel for the Department in this case apparently has lifted language from a brief submitted by the Department in the debarment case against *Edmond Michael Kilbourn, et al.*, HUDALJ 89-1396-DB, where the respondent had taught college courses in income property analysis.

[sic] worth of mortgage payments for Elm Park Subdivision." Respondent Bourgeois contends he made the temporary deposits at the request of a friend "to help a mutual business acquaintance." (Reply Brief, page 1) Since no financial statement was submitted by Respondent Bourgeois, it is impossible to make a finding that debarment would indeed deprive him of his livelihood as argued by his counsel. What documentation was submitted suggests that notwithstanding counsel's unsubstantiated plea of poverty, Respondent Bourgeois has financial resources other than Respondent Southern upon which he can rely to pay his living expenses and make restitution to HUD.[3] In sum, the record reveals no creditable reason why Respondent Bourgeois should not be debarred.

As for Respondent Southern, Respondents have posed several arguments, not all of them consistent with one another:

> Southern Title, Inc. was absolutely innocent of any wrongdoing. No owner, officer or employee of Southern Title, Inc., other than Bourgeois, had any knowledge of or participation in any facet of the fraudulent activity. Suspension and debarment of Southern Title, Inc. from HUD covered transactions will undoubtedly result in insolvency of the corporation because such transactions comprise 80% of all of Southern Title's business. Such a result will work an unjust hardship on the other owner and all employees of the company. Additionally, debarment of Southern Title will necessarily abort Ms. Forrest's [an employee] attempted buyout of Mr. Bourgeois' ownership interest, because debarment will render Southern Title stock worthless.

(November 9, 1989 Brief, pp.5-6.) In the Reply Brief filed March 26, 1990, Respondents abandon the argument that debarment would interfere with the sale of Respondent Southern and instead contend that Respondent Southern is now under the exclusive management and control of Respondent Bourgeois' brother, David, and hence the company should not be debarred. To support that contention, Respondents have submitted copies of a "Voting Trust Agreement" dated March 22, 1990; a "Trust Certificate"; a letter of resignation signed by Respondent Bourgeois as president of

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[3]In the November 9, 1989 brief, counsel for Respondent Bourgeois paints a different picture of the sequence of events leading to Respondent Bourgeois' conviction. According to counsel, Respondent Bourgeois first deposited an unspecified amount of funds into two different G & N accounts on two different occasions. On a later date Respondent Bourgeois is reported to have loaned Lloyd Broussard, co-owner of G & N, $75,000 in order to complete work on 100 houses G & N was building, of which $50,000 was received as partial repayment when 37 of the properties went to closing. The dates of the loan and partial repayment are not disclosed. Like the indictment, counsel's version of the facts also suggests Respondent Bourgeois is a person with considerable financial resources beyond that of a salaried loan officer of a title company.

Respondent Southern; a letter dated March 22, 1990 regarding the management of Respondent Southern signed by David Bourgeois; and incorporation papers for Southern Escrow & Title Services, Inc., filed with the Louisiana Secretary of State on March 19, 1990. These documents ostensibly show that Respondent Bourgeois has removed himself from the management and control of Respondent Southern, now solely managed and controlled by David Bourgeois, and that Respondent Bourgeois has established another title company "by which," in the words of counsel, "he intends to undertake business operations." (Reply Brief, p.1)

Claims of "innocence" from Respondent Southern cannot be credited. Respondent Southern is a "participant" within the meaning of the regulations (24 C.F.R. sec. 24.105 (m)), and Respondent Bourgeois' conduct should be imputed to it.

> The fraudulent, criminal or other seriously improper conduct of any officer, director, shareholder partner, employee, or other individual associated with a participant may be imputed to the participant when the conduct occurred in connection with the individual's performance of duties for or on behalf of the participant, or with the participant's knowledge, approval, or acquiescence....

24 C.F.R. sec. 24.325 (b)(1) Respondent Southern is a closely held corporation, now apparently owned by Respondent Bourgeois and his brother,[4] and Respondent Bourgeois was its president, manager and controller when he committed the crime which led to this proceeding. In other words, Respondent Bourgeois' criminal conduct occurred in connection with his performance of duties for or on behalf of Respondent Southern. It appears Respondent Bourgeois was the *alter ego* of the corporation. Therefore, his conduct must be construed as the conduct of the corporation, that is, Respondent Bourgeois' conduct must be imputed to Respondent Southern. It necessarily follows that there is cause to debar Respondent Southern as well as Respondent Bourgeois.

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[4]Respondents' November 9, 1989 Brief states that Respondent Bourgeois is "a shareholder" in Respondent Southern and that the "other owner" would be adversely affected by debarment of Respondent Southern. The "other owner" is not identified. In contrast, in the indictment Respondent Bourgeois is referred to as *"the* owner."(Emphasis supplied) Similarly, the Department's Brief states that Respondent Southern is "owned and controlled" by Respondent Bourgeois. The Voting Trust Agreement dated March 21, 1990 states that Respondent Bourgeois is the "owner of all of the shares of the issued and outstanding common voting stock of" Respondent Southern. However, that statement does not preclude the existence of other types of shareholders, such as holders of preferred stock or non-voting common stock. Whether or not Respondent Bourgeois was the sole owner of Respondent Southern during the period covered by the indictment, the record shows that as of March 1990, Respondent Southern was owned by Respondent Bourgeois and his brother, David Bourgeois. It is impossible to determine with absolute certainty on this record whether anyone else has an ownership interest in the company at the present time.

Respondent Southern unquestionably was an "affiliate" of Respondent Bourgeois during the period covered by his conviction.

> *Affiliate.* Persons are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other, *or*, a third person controls or has the power to control both. Indicia of control include, but are not limited to: interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the suspension or debarment of a person which has the same or similar management, ownership, or principal employees as the suspended, debarred, ineligible, or voluntarily excluded person.

24 C.F.R. sec. 24.105(b) The question is whether Respondent Southern currently is an affiliate of Respondent Bourgeois for purposes of this case. I am persuaded that it is. Most of the indicia of control listed in the regulation cited above are satisfied here. Although stock certificates and voting trust certificates of undetermined value rather than money formed the consideration in the transaction which made Respondent Bourgeois and David Bourgeois holders of legal and equitable title to Respondent Southern, Respondent Bourgeois and his brother nevertheless own Respondent Southern. As brothers who together own Respondent Southern, Respondent Bourgeois and David Bourgeois have an identity of interests. The "new" Respondent Southern was formed following the suspension of the "old" Respondent Southern. Furthermore, the face of the documents ostensibly reorganizing Respondent Southern reveals that the sole purpose of that reorganization was to evade the impact of any debarment which might be imposed upon Respondent Bourgeois.[5] Finally, the street address of Respondent Southern is 2007 Ames Boulevard; the street address of Respondent Bourgeois' new solely-owned title company with a nearly identical name, Southern

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[5]The Voting Trust Agreement includes the following provisions:

> DURATION OF TRUST
> .1 This agreement shall continue in full force and effect until the earlier of three (3) years from the date of this Agreement, or the happening of one or more of the following events, at which time this Agreement shall terminate:
> .1.1 The unanimous written consent of a majority of the Voting Trustee [sic] to terminate this Agreement.
> .1.2 The Bankruptcy, receivership, dissolution or other cessation of the business of Corporation.
> .1.3 The sale of all of the Voting Stock.
> .1.4 The death of Deryle Bourgeois.
> .1.5 Any breach of the terms of this Agreement by any of the Voting Trustee [sic].
> .1.6 *Termination of Deryle Bourgeois' suspension and debarment*.[Emphasis supplied]

Escrow & Title Services, Inc., is 2005-A Ames Boulevard in the same city. That means the two companies are either in the same building or next-door neighbors. It is quite conceivable that they could share the same facilities, employees or customers. But whether or not they do, the evidence will not permit a finding that these two companies are separate, independent title companies in competition with one another. Despite David Bourgeois' unsworn statement that he will manage Respondent Southern by himself, the relationship between these two companies is far too close to conclude that they and their owners are not affiliated.[6] Accordingly, I conclude that regardless of the March 1990 changes in the ostensible ownership and management of Respondent Southern, that company remains an "affiliate" of Respondent Bourgeois for purposes of any debarment imposed upon Respondent Bourgeois. (24 C.F.R. sec. 24.105(b))

Respondents complain that if Respondent Southern is debarred, innocent people will be harmed. That unfortunate possibility cannot determine whether or not Respondent Southern is debarred. The purpose of a debarment proceeding is to protect the public interest. That purpose takes precedence over the personal, parochial interests of private parties who may be adversely affected by debarment of a party from conducting business with the Government. *See,* 24 C.F.R. sec. 24.115.

The regulations provide that the period of a debarment must be

> commensurate with the seriousness of the cause(s). If a suspension precedes a debarment, the suspension period shall be considered in determining the debarment period.

24 C.F.R. sec. 24.320(a). Where a conviction is the cause for the debarment, the period of debarment "generally should not exceed three years." *Id.* However, the regulations authorize a longer period "[w]here circumstances warrant." *Id.* at sec. 24.320(a)(1). "The respondent has the burden of proof for establishing mitigating circumstances." 24 C.F.R. sec. 24.313(b)(4). The Department has proposed debarment for a period of three years from the date of suspension, that is, October 10, 1989. In the absence of persuasive mitigating evidence, that proposal would be adopted, but the record in the instant case reveals mitigating circumstances meriting a reduction in the

[6]Neither Respondent Bourgeois nor his brother submitted statements subject to perjury penalties swearing that the two companies are separate entities with no connection other than ownership.

period of debarment to two years.

Peter G. Strasser, the Assistant United States Attorney who prosecuted Respondent Bourgeois, has submitted a letter in support of the Respondent which states in part:

> First, as a matter of background, Mr. Bourgeois cooperated fully with the authorities in the investigation and prosecution of the underlying scheme in which he found himself entangled. His testimony and statements contributed to the successful indictment and prosecution of others much more culpable than himself. His culpability was limited by his limited pre-knowledge of the scheme devised by others. While he undertook certain acts which were asked of him by the main actors in the scheme, he apparently was without knowledge of the intended criminality until after undertaking his initial conduct. His continued involvement after becoming aware of the criminal scheme, however, ensured his prosecution.
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> Second, as to his current status as a danger to government financed programs, I cannot express an opinion. It is true, however, that he did not design the scheme in which he became entangled. He now is experienced as to the consequences of permitting himself to become involved even peripherally in a criminal scheme, so if a similar situation were to arise, he would now be knowledgeable as to the necessity of avoiding his becoming criminally culpable. Based on my knowledge of his character, I would certainly expect that he would promptly report to the proper authorities any situation which would possibly compromise his position.

This letter was submitted in conjunction with the Respondents' Reply Brief on March 26, 1990. Since the Department did not submit, nor seek to submit, a response, it appears the Department has no significant quarrel with the thrust of Mr. Strasser's remarks. These remarks constitute an extraordinary testimonial on behalf of a convicted felon by his prosecutor. On the strength of Mr. Strasser's statement I conclude that it is appropriate to reduce the length of the debarment from the proposed three years to two years, beginning on the date of suspension. To reduce it any further would nullify the seriousness of the cause for debarment, thereby jeopardizing the integrity of the Government's debarment program. Respondent Bourgeois has committed a serious offense against the commonweal. The public interest requires that serious consequences follow from serious offenses. Debarment for two years will adequately protect the public interest.

## Conclusion and Determination

Upon consideration of the public interest and the entire record in this matter, I conclude and determine that good cause exists to debar Respondent Deryle Bourgeois

and Respondent Southern Title Company from further participation in primary covered transactions and lower tier covered transactions *(See*, 24 C.F.R. sec. 24.110(a)(1)) as either participants or principals at HUD and throughout the Executive Branch of the federal Government and from participating in procurement contracts with HUD for a period of two years from October 10, 1989.

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THOMAS C. HEINZ
Administrative Law Judge

Dated: May 30, 1990.